

Tennessee v. Lane: How Illegitimate Power Negated Non-Existent Immunity

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Overview

Tennessee v. Lane is about sovereign immunity and congressional power. On the immunity question, the Court got it right, for the wrong reason. Tennessee was not entitled to immunity—not because its claim to immunity was abrogated by Congress, but because the Eleventh Amendment does not confer immunity in federal question cases. On the congressional power question, the Court mistakenly found legislative authority under section 5 of the Fourteenth Amendment to enact Title II of the Americans with Disabilities Act. Given the facts in *Lane*, that power does not exist. Nor is there a constitutional pedigree to be found for Title II within any reasonable understanding of the Commerce Clause.

I. Introduction

Would you believe, nine sovereign immunity decisions in the past eight years? That's right, the Supreme Court has muddled through a remarkable series of cases that has distended and distorted the Eleventh Amendment's immunity doctrine, now wholly unleashed from its crystal-clear text. *Tennessee v. Lane*¹ is the latest in the litany—a 5–4 opinion by Justice Stevens that affirmed Congress's power to abrogate state immunity from most private claims for money damages. After a string of federalism cases that repudiated Congress's power to override state immunity, the Court appears to have curbed its enthusiasm.

Justice O'Connor joined the liberal bloc as she did in last year's immunity controversy, *Nevada Department of Human Resources v. Hibbs*,² the first Court case in recent memory to uphold congressional

¹124 S. Ct. 1978 (2004).

²538 U.S. 721 (2003).

power to supersede the Eleventh Amendment. After a brief apostasy in *Hibbs*, Chief Justice Rehnquist dissented in *Lane* and reaffirmed his brand of federalism. He was joined by Justices Kennedy and Thomas. Justice Scalia dissented separately.³

The underlying statute at issue in *Lane* was the Americans with Disabilities Act of 1990 (ADA),⁴ which states in Title II that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs or activities of a public entity.”⁵ Plaintiffs Beverly Jones and George Lane, both paraplegics, sued the state of Tennessee, contending that they were refused access to, and the services of, the state court system on account of their disability.⁶ Jones is a court reporter who asserted that she lost work because some county courthouses are not wheelchair-accessible. Lane alleged more agonizing facts. He was charged with a criminal traffic offense and had to crawl up two flights of stairs to reach the courtroom. At a subsequent hearing, he declined a second opportunity to crawl or be carried, and then rejected an offer to move all proceedings to a handicapped-accessible courtroom in a nearby town. As a result, Lane was arrested and jailed for failing to appear at his hearing.

The trial court denied Tennessee’s motion to dismiss claims by Jones and Lane on immunity grounds. Tennessee then asked the U.S. Court of Appeals for the Sixth Circuit to reverse. At first, the Sixth Circuit delayed review until the Supreme Court could rule in a then-pending Eleventh Amendment case, *Board of Trustees of the University of Alabama v. Garrett*,⁷ which also involved the ADA (albeit Title I,⁸ prohibiting employment discrimination against the disabled.) But then the Sixth Circuit changed its mind: The court of appeals decided that *Garrett* did not control the outcome in *Lane*

³Also filed, but not discussed here: a dissent by Justice Thomas, 124 S. Ct. at 2013; a concurrence by Justice Souter, joined by Justice Ginsburg, 124 S. Ct. at 1995; and a concurrence by Justice Ginsburg, joined by Justices Souter and Breyer, 124 S. Ct. at 1996.

⁴42 U.S.C. § 12101 et seq.

⁵42 U.S.C. § 12132.

⁶Four other plaintiffs later joined the lawsuit, but the Court cites only the claims by Lane and Jones.

⁷531 U.S. 356 (2001).

⁸42 U.S.C. § 12111 et seq.

after all. That's because *Garrett* was an equal protection case alleging employment discrimination against a particular class—the disabled—in violation of the ADA's Title I. *Lane*, by contrast, was a Title II case based on denial of courtroom access, which was deemed to be a due process issue. Based in part on that distinction, the Sixth Circuit upheld the trial court's refusal to dismiss *Lane*.

The Supreme Court agreed with the Sixth Circuit. Essentially, the Supreme Court adopted this logic:

- Under the Eleventh Amendment, Tennessee is entitled to sovereign immunity against suits for money damages.
- Congress can abrogate Tennessee's sovereign immunity if, among other things, it clearly expresses an intent to do so. The Court found that Congress had unambiguously declared its intent in the ADA.
- However, Congress also must base its abrogation of immunity on some constitutional authority. When it passed the ADA, Congress cited both the Commerce Clause and the Fourteenth Amendment as its source of authority.⁹ But an earlier Supreme Court case¹⁰ held that Congress, when it enacts legislation under the Commerce Clause, cannot abrogate Eleventh Amendment immunity.¹¹ The Court, therefore, turned to section 5 of the Fourteenth Amendment.
- The Court held Congress *can* abrogate immunity when it enacts legislation to enforce the Fourteenth Amendment's Due Process and Equal Protection Clauses, provided that the means adopted are "congruent and proportional" to the underlying harm.¹² In *Lane*, said the Court, those conditions were met by Title II of the ADA.

In Part II below, I summarize Justice Stevens's majority opinion. Part III explores whether Tennessee can legitimately claim Eleventh Amendment immunity, and concludes that no immunity exists because the Eleventh Amendment does not apply to this case. That

⁹42 U.S.C. § 12101(b)(4).

¹⁰*Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

¹¹*Id.* at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.').

¹²See *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

means the Court did not need to scrutinize Congress's power to abrogate immunity under the Fourteenth Amendment.

Nonetheless, the Court incorrectly perceived a need to abrogate immunity and looked, therefore, to the Fourteenth Amendment for a congressional power to do so. Part IV addresses whether the enactment of Title II was authorized under section 5 of that amendment. A majority of the justices said yes. Four justices disagreed. I review the two major dissenting opinions and decide that the dissenters have the better of the argument. The Court's "congruence and proportionality" criteria for validating federal intervention to enforce the Fourteenth Amendment were not fulfilled in this case.

Then, in Part V, I comment on what the Court should have held if it had sought to justify federal intervention under the Commerce Clause. I find that the commerce power affords no authority for Title II of the ADA—a statute that creates a private cause of action for disabled persons who claim to have been excluded from the benefits of state services. Even if it were demonstrated that the plaintiffs in *Lane* were in fact denied access to a state court, such access is not commerce; it is not interstate; and it is not, then, a fit subject for the Commerce Clause, the primary purpose of which is to ensure the free flow of trade among the several states.

II. The Majority Opinion

The issue tackled by the Court in *Lane* was whether Congress, legislating under section 5 of the Fourteenth Amendment, could force states to provide access by disabled persons to public facilities. The majority held that the legislation, Title II of the ADA, is constitutional if the access at issue is a fundamental right, such as access to the courts. Access to other, presumably less vital, public facilities—such as a public swimming pool—might not be guaranteed, depending on future Court rulings.

Advocates for the disabled, supported by the Bush administration, wanted a more expansive ruling that would have ensured access to a wide range of public services and activities. But Justice Stevens limited the Court's holding "to the class of cases implicating the fundamental right of access to the courts."¹³ According to Tony Coelho, the former House majority whip (D-Calif.) who played a

¹³Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004).

leading role in drafting the ADA, the majority focused on the issue of court access “in order to get Justice O’Connor’s vote.”¹⁴

New York Times reporter Linda Greenhouse agreed. She wrote that “it was clearly more important for Justice Stevens and his usual three allies to win Justice O’Connor’s support than to set out a far-reaching critique of the 2001 disability decision [referring to *Garrett*] or of others she had joined on the states’-rights side.”¹⁵ Greenhouse observed that the “majority’s focus on the ‘basic right’ of access to court . . . served its purpose without prejudging future cases.”¹⁶ The Court’s fragile 5–4 majority, she concluded, “managed to carve out one disputed application of the law and uphold it in the face of Tennessee’s claim of constitutional immunity”—“a development with potentially broad implications.”¹⁷

Indeed, Stevens managed to leave the door half-opened. He cited evidence of additional problems faced by the disabled—going beyond access to the courts and touching on areas such as voting, marriage, jury duty, treatment of the retarded, and public education.¹⁸ Those citations have given activists hope that *Lane* might be useful ammunition if other Title II cases reach the high Court.

The scope of the evidence considered by Stevens also helped the Court distinguish between *Lane* and *Garrett*, the 2001 case in which the Court told Congress it could not enforce the anti-discrimination provisions of Title I of the ADA against state employers. University of California (Hastings) law professor Vikram David Amar points out that the Court, by reviewing more evidence in *Lane*, “was able to characterize the congressional demonstration of state constitutional violations as more egregious.”¹⁹

Amar speculates that *Garrett* might have gone the other way if the evidentiary lens had been as wide as the one used in *Lane*. He

¹⁴Quoted in Charles Lane, *Disabled Win Right to Sue States over Court Access*, *Washington Post*, May 18, 2004, at A1.

¹⁵Linda Greenhouse, *Justices Find States Can Be Liable for Not Making Courthouses Accessible to Disabled*, *New York Times*, May 18, 2004, at A20.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Lane*, 124 S. Ct. at 1989.

¹⁹Vikram David Amar, *The Supreme Court Hands Down a Key Federalism/Disability Law Decision, and Surprises Some Observers with Its Result*, *Findlaw’s Legal Commentary* (May 27, 2004), at <http://writ.news.findlaw.com/amar/20040527.html>.

noted two major differences. First, *Garrett* had considered only state employers, not county and city employers. By contrast, *Lane* took into account courtrooms run by municipal and county officials. Second, *Garrett* was an employment case and did not examine state discrimination in other contexts. *Lane*, on the other hand, looked at settings outside the courtroom, even though the Court's holding applied only to courtroom access.²⁰

In addition to parsing the evidence, the Court's legal analysis in *Lane* went like this: To determine if Congress can abrogate a state's Eleventh Amendment immunity, the threshold question is whether the underlying federal legislation unequivocally states an intent to abrogate. In *Lane*, that was not a disputed issue. The ADA specifically provides: "A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court."²¹

The second question for the Court was more difficult: Did Congress act pursuant to a valid grant of constitutional authority? Under section 5 of the Fourteenth Amendment, said the Court, Congress's enforcement power includes authority both to remedy and to deter violations. That means Congress can prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."²² In other words, Congress can legislate prophylactically to prevent unconstitutional conduct even if, in the process, it prohibits acts that are not themselves unconstitutional. In *Hibbs*, for example, the Court upheld the Family and Medical Leave Act of 1993,²³ which invalidated a state's medical leave policy because it had a discriminatory effect, even though the state policy had not been adopted with an unconstitutional discriminatory purpose.

The *Lane* Court cautioned, however, that the measures adopted by Congress under section 5 are not unlimited; they "may not work a 'substantive change in the governing law.'"²⁴ That said, the line between a remedy and a substantive change is not easy to draw.

²⁰ *Id.*

²¹ 42 U.S.C. § 12202.

²² *Lane*, 124 S. Ct. at 1985 (citation omitted).

²³ 29 U.S.C. § 2601 et seq.

²⁴ *Lane*, 124 S. Ct. at 1986 (citing *Boerne v. Flores*, 521 U.S. 507, 519 (1997)).

How Illegitimate Power Negated Non-Existent Immunity

The touchstone, under *Boerne v. Flores*,²⁵ is that the means chosen by Congress must be congruent and proportional to the injury to be prevented or remedied.²⁶

For example, in *Garrett*, the Court held that Title I of the ADA, which barred discrimination in employment against the disabled, was not a valid enforcement of the Fourteenth Amendment's Equal Protection Clause. That conclusion was reached, in part, because Congress could not point to any history of unconstitutional discrimination by public employers. Instead, Congress had spotlighted employment discrimination in the *private* sector.²⁷ As a result, the Court concluded Congress had not adequately shown any basis in fact for abrogating state immunity. Put another way, the sweep of the statute was too broad; its remedies were not targeted at the identified harms.

But the *Lane* Court treated Title II differently. That's because Lane sought access to rights that are secured by the Due Process Clause. Lane is entitled under that clause to be present at his trial, heard by the court, and judged by a jury of his peers.²⁸ Abridgement of those rights is subject to "more searching judicial review" than in *Garrett*, where unequal treatment of the disabled was not constitutionally "suspect" and did not therefore trigger heightened scrutiny.²⁹ In *Lane*, "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights."³⁰ The Court concluded that the right of access to courts called for "a standard of judicial review at least as searching, and in some cases more searching, than the standard that applie[d] to sex-based classifications" in last term's *Hibbs* case.³¹

In applying that heightened standard, the *Lane* Court still had to determine whether Title II was an appropriate response to the history

²⁵ *Supra* note 12.

²⁶ Lane, 124 S. Ct. at 1986 (citing *Boerne*, 521 U.S. at 520).

²⁷ Board of Trustees of the University of Alabama v. *Garrett*, 531 U.S. 356, 371–72 (2001).

²⁸ Lane, 124 S. Ct. at 1989.

²⁹ *Id.* at 1992.

³⁰ *Id.* at 1989.

³¹ *Id.* at 1992.

and pattern of treatment that had been documented. The key to that question lay in the Court's pronouncement that *Lane* is an "as applied" constitutional challenge rather than a "facial" challenge—a subject to which we will return in Part IV, which discusses Justice Rehnquist's dissent. For now, it's important to recall that Justice Stevens decided *Lane* narrowly—limiting its holding to courtroom access, not the full scope of activities covered by Title II. As Stevens put it: "[T]he question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."³²

The assessment of the *Lane* majority was that "Congress's chosen remedy . . . , Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts."³³ The only qualification, volunteered Stevens, is that the states need not employ any and all means to ensure courtroom access. All that is necessary are "'reasonable modifications' that would not fundamentally alter the nature of the services provided, and only when the individual seeking modification is otherwise eligible for the service."³⁴ In no event, he added, "is the entity required to undertake measures that would impose an undue financial or administrative burden [or] threaten historic preservation interests."³⁵

With that background, we turn next to an analysis of the majority opinion from two perspectives: first, whether Tennessee's claim of Eleventh Amendment immunity is supportable in a federal question case; second, whether Title II of the ADA rests on a sound constitutional footing.

III. The Case Against Sovereign Immunity

A. *What the Courts Have Said*

Beginning in 1890 and concluding with an unbroken string of seven cases from 1996 through 2002, the Supreme Court enlarged the

³² *Id.* at 1993.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1994.

doctrine of sovereign immunity, which bars most private lawsuits against non-consenting state governments for money damages.³⁶ Along the way, the Court ignored the plain text of the Eleventh Amendment: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”³⁷

In its earliest case, *Hans v. Louisiana*,³⁸ despite the Eleventh Amendment’s clear mandate that the litigants be from different states, the Court held that sovereign immunity applies to suits against a state by its own citizens. More than a century later, in 1996, the Court immunized states against actions brought under federal question, not just diversity, jurisdiction.³⁹ Then in 1999, the Court extended immunity to suits in state courts.⁴⁰

The Court has acknowledged only one new exemption from its ballooning immunity doctrine: States remain vulnerable to private suits pursuant to federal laws that enforce the Fourteenth Amendment. But then, in four cases from 1999 through 2001, the Court steadily chipped away at that exemption. Two of those cases were near-replicas of *Lane*. In *Kimel v. Florida Board of Regents*,⁴¹ the Court concluded that Congress’s attempted abrogation of state immunity in the Age Discrimination in Employment Act⁴² exceeded its authority to enforce the Fourteenth Amendment.⁴³ Age, the Court said, is not a “suspect class,” so states have more leeway to discriminate by age than by, say, race.⁴⁴ Thirteen months later, the Court decided

³⁶This section has been extracted in part from Robert A. Levy, *People v. State: The Law Should Protect Citizens’ Dignity, Not States’ Immunity*, *Legal Times*, June 16, 2003, at 74. See also Robert A. Levy, *When State Dignity Trumps Individual Rights*, 2001–2002 *Cato Sup. Ct. Rev.* 31 (2002).

³⁷U.S. Const. amend. XI.

³⁸134 U.S. 1 (1890).

³⁹*Seminole Tribe v. Florida*, 517 U.S. 44, 66–67, 72 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had held that Congress is empowered to abrogate state sovereign immunity when legislating under the Commerce Clause).

⁴⁰*Alden v. Maine*, 527 U.S. 706, 755 (1999).

⁴¹528 U.S. 62 (2000).

⁴²42 U.S.C. § 6101 et seq.

⁴³*Kimel*, 528 U.S. at 82–83.

⁴⁴*Id.* at 83.

Garrett, upholding state immunity from suit under Title I of the ADA. Disability, like age, is not a suspect class.⁴⁵

Lastly, the Court's ever-widening immunity doctrine was broadened to bar suits by private parties against a state in a federal administrative agency. The conservative majority in that case, *Federal Maritime Commission v. South Carolina State Ports Authority*,⁴⁶ asserted that the "central purpose" of sovereign immunity "is to accord the States the respect owed them as joint sovereigns."⁴⁷ In other words, the primary reason for immunity is to give the states the dignity that their sovereign status entails.

But if state dignity is the justification for sovereign immunity, what can explain the numerous exceptions that have been carved out? A state can be sued by the federal government or another state. Political subdivisions, school boards, and municipalities, which are creations of the state, can be sued under the Eleventh Amendment.⁴⁸ So can state officials in their personal capacity.⁴⁹ And both *Hibbs* (2003) and *Lane* (2004) now confirm that a state can be sued by private individuals in certain enforcement actions under the Fourteenth Amendment.

The relevant legislation in *Hibbs* was the Family Medical Leave Act (FMLA),⁵⁰ which grants unpaid leave when an employee's parent, child, or spouse is seriously ill. The FMLA was designed to address lingering gender discrimination in the workplace. Congress found that women were disproportionately burdened by having to take care of sick family members. Because the alleged discrimination was based on gender, which the Court gives heightened review, not

⁴⁵In two other 1999 cases, the Court rejected congressional attempts to abrogate Eleventh Amendment immunity by invoking the Fourteenth Amendment. See *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 642–43, 645–46 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672–75 (1999). For further details, see Levy, *When State Dignity Trumps Individual Rights*, *supra* note 36, at 37–38.

⁴⁶535 U.S. 743 (2002).

⁴⁷*Id.* at 765 (internal quotation omitted).

⁴⁸See, for example, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

⁴⁹*Ex parte Young*, 209 U.S. 123 (1908).

⁵⁰*Supra* note 23.

the minimal scrutiny applied to age- or disability-based discrimination, “it was easier for Congress to show a pattern of state constitutional violations.”⁵¹

Like *Hibbs*, *Lane* was a case in which the Court had an easier time finding state misconduct that rose to the level of a constitutional infraction. In *Lane*, however, the Court’s heightened scrutiny was not attributable to discrimination on the basis of a suspect class. Instead, the Court’s rationale was based on due process, and the increased scrutiny derived from alleged denial of a “fundamental” right—access to the court.

B. The Trouble With Sovereign Immunity

By abrogating Tennessee’s sovereign immunity, *Lane* produced the right result—even though for the wrong reason. Regrettably, the Court missed its ninth opportunity in eight years to affirm that compensating injured parties and deterring state misbehavior takes precedence over safeguarding government bank accounts. A free society cannot subordinate the rights of individuals to the “dignity” of state governments—not even with the noble aim of inhibiting federal power.

A proper understanding of the role of government dictates that the Eleventh Amendment be construed narrowly. Clearly, that is not what the Court had done pre-*Hibbs*. By its extra-textual reading of the amendment, the Court took the common law concept of sovereign immunity, dubious on its own terms,⁵² and constitutionalized it. Concern for state dignity superseded the rights of individuals, relegated by judicial edict to the bottom of the pecking order. Essentially, the Rehnquist Court had embraced the appalling notion that states can violate individual rights without being held accountable for monetary losses associated with personal injuries.

In its defense, the Court proceeded with the best of intentions—to restrain a Congress that has flouted the doctrine of enumerated powers and established a pervasive regulatory and redistributive state that threatens individual liberty. The federal government has

⁵¹ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003).

⁵² See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 95 (1996) (Souter, J., dissenting) (noting that the common law doctrine of sovereign immunity rested on the “absurd” belief that “the King can do no wrong”).

wormed its way into virtually every aspect of our lives—imposing rules to control a broad array of human endeavor, exacting tribute from anyone, for almost any purpose, then dispensing the proceeds to anyone else. No doubt, the Court's steps to curtail Congress's seemingly boundless powers were long overdue.

But, while the Rehnquist Court justifiably tried to slow down the federal juggernaut, it went about it in the wrong manner. The proper remedy is to attack unconstitutional statutes on their merits, not to pretend that federal law can't be invoked by individuals against state governments when damages are sought.

The real culprit was the 1996 *Seminole* case, in which the Court extended sovereign immunity to cover cases brought against states under *federal* law. Bear in mind that Article III of the Constitution provides that federal courts can decide two types of lawsuits: those concerning federal law,⁵³ and those involving citizens of different states.⁵⁴ The text of the Eleventh Amendment covers the second type (so-called diversity of citizenship cases) but not the first type (so-called federal question cases.) That didn't stop the Supreme Court in *Seminole*, not even the Court's conservatives. The textualist approach to constitutional interpretation, presumably favored by the conservatives, provides no support for *Seminole* or any of the other cases that have stretched the Eleventh Amendment.

Indeed, the holding in *Seminole* flies in the face of the Supremacy Clause of Article VI. There, the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land."⁵⁵ The hierarchy laid out in Article VI places the laws of the United States above the laws of any state—even above a state constitution. But in *Seminole*, sovereign immunity, which is basically a common law doctrine, is accorded a status above that of a federal statute. As for individuals, they are last in line—sending a message that individuals are subordinate to states rather than the other way around.

The effect of sovereign immunity is to place the government above the law and to ensure that some individuals will be unable to obtain redress for injuries. That's simply not acceptable. In a free society,

⁵³ U.S. Const. art. III, § 2, cl. 2.

⁵⁴ U.S. Const. art. III, § 2, cl. 1.

⁵⁵ U.S. Const. art. VI, cl. 2.

the “dignity” of state governments cannot be permitted to trump the rights of individual Americans.

Perhaps the Constitution would be a more liberating document if the Eleventh Amendment had never been ratified. But, of course, it was ratified in 1795, and the Court is stuck with it. That does not, however, obligate the Court to extend the reach of the amendment by reading more into it than can possibly be justified by its unambiguous text.

IV. Congressional Power: The Dissenters’ Case Against the Fourteenth Amendment

Notwithstanding the compelling arguments against Eleventh Amendment immunity in federal question cases, the Supreme Court has been unwilling to revisit *Seminole*. Yet the Court now seems disposed to permit congressional abrogation of state immunity under the Fourteenth Amendment. That’s the lesson of *Hibbs*, where the Court applied heightened equal protection scrutiny because of perceived gender discrimination by the state; and *Lane*, where the Court applied heightened due process scrutiny because of perceived denial of courtroom access—a “fundamental” right—by the state.

Not all of the justices agreed with those results. In *Hibbs*, Justice Kennedy, joined in dissent by Justices Scalia and Thomas, questioned whether the states had “engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits.”⁵⁶ He remarked on the Court’s inability to adduce evidence of alleged discrimination and on “the inescapable fact that the federal scheme is not a remedy but a benefit program.”⁵⁷ Justice Scalia, in a separate dissent, warned against “guilt by association, enabling the sovereignty of one State to be abridged . . . because of violations by another State . . . or even by 49 other States.”⁵⁸

The same three justices dissented in *Lane*, along with Chief Justice Rehnquist. I discuss in turn the two major dissents—the first by Chief Justice Rehnquist, the second by Justice Scalia.

⁵⁶ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 745 (2003) (Kennedy, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.* at 741–42 (Scalia, J., dissenting).

A. Rehnquist's Dissent

Rehnquist, joined by Kennedy and Thomas, argued that Title II of the ADA is not a valid section 5 enforcement action. Instead, like Title I in *Garrett*, Title II substantively redefines the rights protected by the Fourteenth Amendment. In reaching that conclusion, Rehnquist goes through the three-step process spelled out in *Boerne*: first, identify the rights at issue; second, examine the evidence cited by Congress to establish a pattern of violations; and third, consider whether the remedies created by Title II are congruent and proportional to the documented violations.

With respect to the rights at issue, Rehnquist observed that Title II goes beyond the equal protection concerns of Title I, which protects the disabled against irrational discrimination. Title II also purports to safeguard rights—such as courtroom access—that fall under the Due Process Clause. Specifically, Rehnquist pinpointed four due process rights cited by the majority: “(1) the right of the criminal defendant to be present at all critical stages of the trial; (2) the right of litigants to have a meaningful opportunity to be heard in judicial proceedings; (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community; and (4) the public right of access to criminal proceedings.”⁵⁹

Next, Rehnquist asked whether Congress had found a history and pattern of violations. His answer: an unequivocal “no.” Although Congress, when it enacted the ADA, offered a wide-ranging account of societal discrimination against the disabled, the bulk of the evidence—mostly unexamined and anecdotal—concerned non-state government acts, which had been deemed irrelevant in prior sovereign immunity cases like *Garrett* and *Kimel*. Some of that evidence might be relevant, stated Rehnquist, if the Court were reviewing Title II as a whole. But the Court had rejected that approach, preferring a narrower “as-applied” inquiry that focused only on courtroom access.⁶⁰

Even if Title II is viewed narrowly, Rehnquist insisted, “the mere existence of an architecturally ‘inaccessible’ courthouse . . . does not state a constitutional violation. A violation of due process occurs

⁵⁹*Tennessee v. Lane*, 124 S. Ct. 1978, 1998–99 (2004) (Rehnquist, C.J., dissenting) (internal quotation and citations omitted).

⁶⁰*Id.* at 1999.

only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance.”⁶¹

Finally, Rehnquist explored the congruence and proportionality of Title II’s remedial provisions. In its findings, Congress had made it clear that Title II attacked discrimination in all areas of public services, as well as the “discriminatory effect” of “architectural, transportation, and communication barriers.”⁶² Rehnquist maintained that those broad terms go beyond arguable constitutional violations. Title II is not tailored to protect *just* courtroom access. Instead, it covers all services, programs, and activities provided by a public entity. As Rehnquist noted, a “requirement of accommodation for the disabled at a state-owned amusement park or sports stadium . . . bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights.”⁶³

Put somewhat differently, Rehnquist considered the coverage of Title II to be massively overbroad—a problem that the majority claimed to have cured with its “as-applied” approach, limited to courtroom access. Rehnquist would sooner have invalidated Title II on a “facial” basis because of its many unconstitutional applications, even if he were to concede that Title II’s application to Lane’s particular challenge might be constitutional.

To be sure, the Court typically disfavors facial, or overbreadth, challenges—preferring to avoid constitutional confrontations by contracting the reach of congressional statutes. In this instance, however, Rehnquist argued persuasively that the Court’s as-applied test cannot be harmonized with *Boerne*’s test for congruence and proportionality. After all, how can the majority assert, on one hand, that Title II must be construed narrowly because it would otherwise restrict state conduct that is constitutionally permissible; then, on the other hand, assert that the remedies provided by Title II are congruent and proportional to documented violations of constitutional rights?

⁶¹*Id.* at 2002.

⁶²42 U.S.C. §§ 12101(a)(3), (a)(5).

⁶³Lane, 124 S. Ct. at 2004 (Rehnquist, C.J., dissenting).

The majority gets away with that legerdemain by positing “a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right.”⁶⁴ That bogus approach, said Rehnquist, becomes a test of whether the Court can visualize an imaginary statute that is narrow enough to constitute valid prophylactic legislation.

B. *Scalia’s Dissent*

Justice Scalia agreed with the chief justice. He too believed that the majority flouted the congruence and proportionality standard. But he filed a separate dissent in *Lane* to push that message further than the other dissenters were willing to go. Despite joining the Court’s opinion in *Boerne*, Scalia rejected the congruence and proportionality test—not only because it is incompatible with the Court’s as-applied maneuver in *Lane*, but also because he does not approve of “such malleable standards as ‘proportionality,’ because they have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”⁶⁵

Scalia claimed to have yielded to the “lessons of experience. The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking Under it, the courts . . . must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.”⁶⁶

In its place, Scalia would substitute a different test, which appears in the text of section 5 of the Fourteenth Amendment. He would require Congress to “enforce” section 5, not to “go beyond the provisions of the Fourteenth Amendment to proscribe, prevent, or ‘remedy’ conduct that does not *itself* violate any provision of the Fourteenth Amendment.” “So-called ‘prophylactic legislation,’” states Scalia, “is reinforcement rather than enforcement.”⁶⁷

⁶⁴ *Id.* at 2005.

⁶⁵ *Id.* at 2007–08 (Scalia, J., dissenting).

⁶⁶ *Id.* at 2008–09.

⁶⁷ *Id.* at 2009.

Scalia conceded just two exceptions to his far-reaching proposal. First, he would authorize legislation that imposes rules directly related to the facilitation of enforcement—like reporting requirements, for example. Second, he would respect past decisions now well-settled in law and allow, on *stare decisis* grounds, prophylactic measures to combat racial discrimination alone. That single practice, according to Scalia, was the issue in dispute when the Court expansively interpreted section 5. When congressional legislation was targeted at discrimination in other areas, the Court was more restrained.

Hereafter, advised Scalia, he will “leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.”⁶⁸ But even in race cases, Scalia will insist that Congress can impose prophylactic legislation on those *particular* states, and no others, that have a history of relevant constitutional violations. In cases not directed at racial discrimination, Scalia will uphold only those statutes that enforce the provisions of the Fourteenth Amendment—that is, legislation that addresses actual or imminent constitutional violations, and does not proscribe state conduct that itself is constitutional, even to deter other conduct that may not be.

Although Rehnquist, Thomas, and Kennedy did not subscribe to Scalia’s recommended overhaul of section 5 jurisprudence, the four

⁶⁸*Id.* at 2013. Scalia’s replacement of “congruent and proportional” with “necessary and proper” may be based on constitutional text, but his new test is unlikely to provide much comfort to advocates of limited federal government. The permissive “necessary and proper” standard that Scalia proposes is the one first enunciated by Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which defines “necessary” as “convenient” and offers little illumination of “proper.” *Id.* at 413. In practice, “necessary and proper” has meant no more than rational basis scrutiny. This term, in *Sabri v. United States*, 124 S. Ct. 1941 (2004), the Court unanimously declined an opportunity to redefine the “Necessary and Proper Clause.” Only Justice Thomas, in a concurring opinion, urged the Court to consider Marshall’s proviso that “necessary” requires not merely a rational link between means and ends, but a link that is “appropriate” and “plainly adapted”—perhaps something closer to an obvious, simple, and direct relationship. *Id.* at 1949 (Thomas, J., concurring). As for “proper,” it should, but has not been interpreted to, suggest a consistency with principles of federalism, separation of powers, and “the background rights retained by the people.” See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 186 (2004).

dissenters in *Lane* got the main question right. There is no constitutional power under section 5 of the Fourteenth Amendment to compel states to provide access by disabled persons to all of the “services, programs or activities of a public entity.”⁶⁹ That’s what Title II is about, and to interpret it narrowly—as if it meant access only to courtrooms—is to ignore its text and eviscerate the mandate in *Boerne* that section 5 legislation must be congruent and proportional to asserted injuries.

Still, rejection of the Fourteenth Amendment as a legitimate source of authority is not the final word. Recall that Congress in enacting the ADA also relied on the Commerce Clause.

V. Congressional Power: The Case Against the Commerce Clause

Lane is not a Commerce Clause case. But it might have been. Suppose, for example, that the United States, not *Lane*, had sued Tennessee for noncompliance with Title II of the ADA; or *Lane* had sued under *Ex parte Young*⁷⁰ for injunctive relief only; or the Supreme Court suddenly realized that the Eleventh Amendment does not immunize states against money damages in federal question cases. Under any of those scenarios, *Lane* would not have been required to establish that sovereign immunity had been abrogated. Consequently, the Court might have circumvented *Seminole’s* proscription and looked at the Commerce Clause rather than the Fourteenth Amendment as a source of congressional authority.

Indeed, that is what Justice Stevens advocated in his *Hibbs* concurring opinion. He first conceded uncertainty about whether the FMLA “was truly needed to secure the guarantees of the Fourteenth Amendment.”⁷¹ But he did not have to resolve that question. Even without a Fourteenth Amendment lineage, declared Stevens, the FMLA fit comfortably under the Court’s modern Commerce Clause jurisprudence.⁷² And on the sovereign immunity question, Stevens correctly noted that “The Eleventh Amendment poses no barrier to

⁶⁹ 42 U.S.C. § 12132.

⁷⁰ *Supra* note 49.

⁷¹ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 741 (2003) (Stevens, J., concurring) (internal quotation omitted).

⁷² *Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Stevens, J., concurring)).

the adjudication of this case because the respondents are citizens of Nevada.”⁷³

Consider also the parallel ADA provisions of Title I (employment) and Title III (public accommodations),⁷⁴ both of which regulate private activities that do not implicate the Fourteenth Amendment. Title III in particular covers many privately operated facilities that are analogous to the publicly operated facilities that come under Title II—for example, concert halls, stadiums, convention centers, hospitals, museums, libraries, transportation terminals, parks, schools and homeless shelters.⁷⁵ Each of those facilities “affect” commerce and would presumably be scrutinized under the Commerce Clause, whether privately or publicly operated.⁷⁶

What, then, would have been the outcome if the Court had relied on the Commerce Clause as the enumerated congressional power that underlies Title II? Well, imagine if a congressman proclaimed before the House of Representatives: “In order to guarantee that trade among the states remain free and unfettered, Congress must direct the states to provide unobstructed physical access to all of their courtrooms by disabled persons accused of criminal traffic violations.” To ponder that statement is to realize how utterly daft it is.

Still, the Court would probably have found Title II to be a legitimate exercise of Congress’s unbounded Commerce Clause power. That’s because Congress and the courts have shamelessly inflated the Commerce Clause—detaching it from the operative word “commerce” and allowing the federal government to assume dominion over nearly all manner of human conduct.

⁷³*Id.*

⁷⁴Title III prohibits discrimination on the basis of disability by privately operated public accommodations, and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with certain accessibility standards. 42 U.S.C. § 12181.

⁷⁵The facilities listed are among those expressly identified as public accommodations covered by Title III. See 42 U.S.C. § 12181(7). Under *García v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Congress can regulate state activities that affect commerce as long as the regulations are generally applicable—i.e., they are also imposed on analogous non-state activities. *Id.* at 554. Titles II and III of the ADA, taken together, seem to meet that requirement.

⁷⁶See, e.g., *United States v. Morvant*, 898 F. Supp. 1157, 1167 (E.D. La. 1995) (“As Congress has not invoked the Fourteenth Amendment with respect to Title III of the ADA, the Court will only address its constitutionality under the Commerce Clause.”).

As the country grew, some people believed that many of its problems required national regulatory solutions. So Congress earmarked a specific constitutional power to justify its ambitious federal agenda. The Commerce Clause was the vehicle of choice. But the Framers' central reason for placing the clause in the Constitution was quite different. Under the Articles of Confederation, the national government lacked the power to regulate interstate commerce. Each state was able to advance local interests and create barriers to trade, without regard to prejudice against out-of-state interests. The hoped-for solution was a constitutional convention at which, according to Justice William Johnson, "If there was any one object riding over every other . . . it was to keep the commercial intercourse among the States free from all invidious and partial restraints."⁷⁷

Thus, the original purpose of the Commerce Clause was functional: to secure the free flow of trade among the states. That meant Congress could act affirmatively whenever actual or imminent state regulations impeded that purpose, or whenever it was clear that uniform national regulations were essential toward that purpose. More concretely, Congress could regulate channels and vehicles of interstate trade, like waterways, airways, and railroads; bar discrimination by a state against out-of-state business interests; and prohibit acts by a state that shape commercial transactions outside the state's borders (e.g., in a modern context, state rules governing national stock exchanges, communications, or the internet.)

Today, however, instead of serving as a shield against interference by the states, the commerce power has become a sword wielded by the federal government in pursuit of an endless array of socioeconomic programs. The defining cases came during the New Deal, and when the Court was through, Congress could regulate anything that "affected" interstate commerce. At some level, everything affects interstate commerce; so the floodgates were opened and the modern regulatory state poured through.

Only in the last decade has the Supreme Court taken modest steps to bind the Congress in the chains of the Constitution. In the 1995 *Lopez* case, Chief Justice Rehnquist said that "[w]e start with first

⁷⁷Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring).

principles. The Constitution creates a Federal Government of enumerated powers."⁷⁸ But that ringing endorsement of limited government yielded no more than an incremental change in the Court's Commerce Clause jurisprudence. *Lopez* was accused of violating a federal law that banned possession of a gun within 1,000 feet of a school.⁷⁹ The Court invalidated that law because the banned conduct was not an economic activity that might, through repetition, have a *substantial* effect on interstate commerce.⁸⁰

Five years later, in *United States v. Morrison*,⁸¹ the Court took another mini-step forward—overturning a federal statute that created a private cause of action for victims of gender-motivated violence. In that case, the Court declared that Congress cannot regulate *noneconomic* acts merely because, in the aggregate, they may affect interstate commerce.⁸² While both *Lopez* and *Morrison* are welcome developments, the Court left in place its essential Commerce Clause precedents, including its notorious holding in *Wickard v. Filburn*,⁸³ which upheld an act of Congress regulating agricultural products grown for personal consumption—supposedly an economic act—because of the aggregate effect on interstate markets.⁸⁴

The real test of the Supreme Court's stance on the Commerce Clause will come in major cases now percolating through the lower courts. All eyes will be on a key case to be argued next term, *Ashcroft v. Raich*,⁸⁵ in which the Court will decide whether the Controlled Substances Act⁸⁶ exceeds Congress's commerce power as applied to intrastate cultivation, possession, distribution and cost-free use of "medical marijuana." The U.S. Court of Appeals for the Ninth Circuit

⁷⁸ *United States v. Lopez*, 514 U.S. 549, 552 (1995).

⁷⁹ *Id.* at 551.

⁸⁰ *Id.* at 549 ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.").

⁸¹ 529 U.S. 598 (2000).

⁸² *Id.* at 617–18 ("We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

⁸³ 317 U.S. 111 (1942).

⁸⁴ *Id.* at 128 ("Home grown wheat . . . competes with wheat in commerce.").

⁸⁵ 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (June 28, 2004) (No. 03-1454).

⁸⁶ 21 U.S.C. § 801 et seq.

has ruled that federal criminal laws against marijuana are unconstitutional when applied to sick people who use the drug with their doctor's approval in accordance with state law.⁸⁷ Ultimately, the case could resolve whether *Wickard* remains valid in the light of *Lopez* and *Morrison*.

Meanwhile, the federal government's power "[t]o regulate Commerce . . . among the several States" cannot reasonably be extended to cover courtroom access by disabled persons facing criminal traffic charges. According to constitutional scholar Randy Barnett,⁸⁸ the text of the Commerce Clause raises three obvious questions: What is commerce? What is "among" the states? What is "to regulate"? Barnett argues that "commerce" means the exchange of goods, including their transportation. "Among the states" means between persons of one state and another. And "to regulate" means to make regular; that is, to decide how transactions can occur in an environment freed of state-imposed prohibitions.⁸⁹

Suppose we reject those definitions, Barnett continues, and adopt the broadest possible meanings. Suppose "commerce" means any gainful activity. "Among the states" means anywhere in the nation, even wholly within a single state. And "to regulate" means to impose federal prohibitions. Applying the new definitions, the Commerce Clause would allow regulation or prohibition of any gainful activity anywhere in the country. But still, the commerce power would not stretch to include *noncommerce*—like criminal defendants' access to state courtrooms.

VI. Conclusion

Presumably applying time-honored principles of federalism, the Supreme Court began in 1996 to invalidate congressional statutes on the ground that they were trumped by sovereign immunity. The Fourteenth Amendment, which postdated the Eleventh Amendment by almost three-quarters of a century, was narrowly construed in successive cases not to authorize private causes of action against the states for money damages. At first blush, that was an appealing outcome for fans of federalism, concerned about the post-New Deal

⁸⁷ *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

⁸⁸ See Barnett, *supra* note 68.

⁸⁹ *Id.* at 278, 313.

avalanche of legislation allowing Congress to regulate anything and everything.

But last year in *Hibbs* and this year in *Lane*, the Court expressed some reservations about its prior sovereign immunity decisions. In those two cases, the reach of the Fourteenth Amendment was extended—first, because *Hibbs* involved alleged discrimination by gender, a “semi-suspect” class; second, because *Lane* involved physical access to courtrooms, a so-called fundamental right. The result: no state immunity from money claims by private parties as long as federal legislation authorizing the suit was enacted to enforce the Fourteenth Amendment, and the means adopted were congruent and proportional to the asserted injuries.

On the surface, that too should have appealed to federalists. Not because they necessarily approve of expanded national powers, but rather because federalism is about *dual* sovereignty, with Congress occasionally called on to redress abuses of power by the states. In other words, federalism is a two-way street: The Tenth Amendment reserves powers to the states that are not enumerated and delegated to the national government; but the Fourteenth Amendment grants power to Congress if the states violate rights that are secured by the federal Constitution.

Nonetheless, a deeper look suggests federalism (understood as *dual* sovereignty) has actually taken a consistent beating. The problem with pre-*Hibbs* immunity cases was that the Supreme Court attempted to curtail federal powers through a backdoor, ill-conceived, extra-textual distention of the Eleventh Amendment, in the process denying private citizens the right to pursue monetary redress for injuries suffered at the hands of the state. The Court refused to recognize that Eleventh Amendment immunity is, quite simply, not available in federal question cases. Rather than apply that straightforward proposition, the Court invented immunity where none existed and then, until last year, struck down federal statutes that were not properly crafted to abrogate immunity.

Happily, in *Hibbs* and *Lane*, the scope of the immunity doctrine has been modestly narrowed. But the Court’s new approach is no less problematic: The Court has suddenly discovered broader powers within the Fourteenth Amendment. By toying with semi-suspect classes, fundamental rights, and tiered levels of scrutiny as bases

for abrogating immunity,⁹⁰ the Court threatens to create expansive new federal powers—a wrongheaded remedy for government bloat.

The proper resolution of the sovereign immunity mishmash involves two steps. First, restrict the purview of the Eleventh Amendment to diversity cases in federal court. Second, ensure that each piece of federal legislation is consistent with principles of federalism, separation of powers, and individual liberty; and has an obvious and direct relationship to the specific constitutional power that the legislation purports to execute. That means a frontal assault on overarching central government—confining Congress to those functions that are limited by and enumerated in the Constitution.

⁹⁰Despite a one-case respite in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court seems fixated on hierarchical rights—each tier commanding different scrutiny when legislation is subjected to judicial review. In *Lawrence*, the Court tried to dodge its post-New Deal case law, which presumes the constitutionality of statutes abridging “non-fundamental” rights. Justice Kennedy, in a 5–4 opinion, held that states may not criminalize private, consensual sodomy—not because such acts are fundamental, but rather because they are an exercise of liberty, the circumscription of which the state had not justified. See generally Randy E. Barnett, Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*, 2002–2003 *Cato Sup. Ct. Rev.* 21 (2003). That’s progress. The Court has yet to announce a coherent and principled theory of rights—including those rights implicit in the Ninth Amendment—by which to conclude that access to a courtroom is fundamental while access to, say, a public library might not be.